

**A Confidence Concrete Sdn Bhd v Shimizu-Peremba
 Sdn Bhd**

HIGH COURT (KUCHING) — CIVIL SUIT NO KG26 OF 1990

B ABDUL KADIR SULAIMAN J
27 DECEMBER 1993

C *Civil Procedure* — Want of prosecution — Striking out action for want of prosecution — Four-year delay — Whether inordinate and inexcusable — Whether intentional and contumelious — Whether delay had caused prejudice — Whether defendants' failure to state how delay had prejudiced them was fatal to the application — Rules of the High Court 1980 O 34 r 2

D *Civil Procedure* — Want of prosecution — Striking out action for want of prosecution — Summons for directions taken out — Case not set down for trial within time period stated in summons — Whether application to dismiss action properly brought under O 25 r 1(4) of the Rules of the High Court 1980 — Rules of the High Court 1980 O 25 r 1(4)

***Civil Procedure* — Want of prosecution — Striking out action for want of prosecution — Defendants also guilty of delay in proceeding with counterclaim — Whether defendants' delay a ground for refusing to dismiss plaintiffs' claim — Rules of the High Court 1980 O 34 r 2**

E The plaintiffs sued the defendants for alleged breach of contract by a writ of summons issued in the Kuala Lumpur High Court on 7 January 1988. The defendants filed its defence and a counterclaim against the plaintiffs on 21 June 1988. However, on 10 March 1988, the defendants had applied via a summons-in-chambers for the suit to be transferred to the Kuching High Court on the ground that the course of action, if any, had arisen in Kuching. The application was heard on 8 June 1989 and a transfer was granted on the same day. In December 1988, before the order for the transfer was made, the plaintiffs had applied for a summons for directions under O 25 of the Rules of the High Court 1980 ('the RHC'). The summons was heard on 16 March 1989 and it was ordered that the suit be set down for trial within 60 days. The plaintiffs failed to do so and on 17 July 1993, some four years later, the defendants applied to have the suit dismissed for want of prosecution under O 25 r 1(4) and O 34 r 8(1) of the RHC and under the inherent jurisdiction of the court.

H The grounds advanced by the plaintiffs in opposing the defendants' application were, inter alia, that: (i) the defendants had failed to show that the delay was intentional and contumelious and had caused them prejudice; and (ii) the defendants could not complain of the delay as the defendants themselves had not pursued their counterclaim against the plaintiffs.

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Held, dismissing the plaintiffs' action for want of prosecution:

- (1) Order 25 r 1(4) of the RHC was not applicable on the facts as this order concerns the failure of plaintiffs in a suit to take out a

- summons for directions. In this case, the plaintiff had already taken out a summons for directions and thus the application under this head was disallowed. A
- (2) The defendants' failure to affirmatively state how the delay had caused them prejudice and to show that the plaintiffs' delay was intentional and contumelious, was not fatal to their application. The four-year delay in setting down the suit for trial was nothing but inordinate and inexcusable as the defendants were greatly prejudiced in having the suit against them hanging over their heads indefinitely, not knowing when it was going to be brought to trial. The longer the delay, the greater the likelihood of serious prejudice at the trial and the necessary inference from the evidence was that the plaintiffs' default was intentional and contumelious. Furthermore, public policy and the administration of justice would not condone the action of an indolent plaintiff. B
- (3) The mention of abuse of process of court in the plaintiffs' application, ie a ground which was not recognized in dismissing a suit for want of prosecution, did not take away the jurisdiction of the court to dismiss the plaintiffs' suit under O 34 r 2(2) of the RHC. C
- (4) The court could not refuse an application for dismissal for want of prosecution under O 34 r 2(2) of the RHC solely on the ground that the defendant was also guilty of delay in pursuing the counterclaim. On the other hand, the court could only dismiss an action under O 34 r 2(2) where an application had been made and in this case, the plaintiffs had not applied to have the counterclaim dismissed for want of prosecution. Even so, the inability of the court to dismiss the defendant's counterclaim did not affect its discretion to dismiss the plaintiffs' suit for want of prosecution. D
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Per curiam:

The defendant's application under O 34 r 8(1) of the RHC was mistaken as O 34 r 8(1) concerns a situation where the plaintiff in a suit fails to give notice of trial within the time prescribed. The notice of trial is provided for by O 34 r 7 of the RHC and has nothing to do with an order setting down an action for trial. G

[Bahasa Malaysia summary

Plaintif telah mendakwa defendan atas suatu kemungkirkan kontrak yang dikatakan melalui suatu writ saman yang dikeluarkan oleh Mahkamah Tinggi Kuala Lumpur pada 7 Januari 1988. Defendan telah memfailkan pembelaan dan tuntutan balasnya terhadap plaintif pada 21 Jun 1988. Walau bagaimanapun, pada 10 Mac 1988, defendan telah memohon melalui suatu saman dalam kamar supaya tindakan itu dipindahkan ke Mahkamah Tinggi Kuching atas alasan bahawa kausa tindakan itu, jika ada, telah timbul di Kuching. Permohonan itu telah didengar pada 8 Jun 1989 dan suatu pemindahan telah dibenarkan H

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A pada hari yang sama juga. Pada bulan Disember 1988, sebelum perintah untuk pemindahan itu dibuat, plaintif telah memohon untuk suatu saman untuk arahan di bawah A 25 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT itu'). Saman itu telah didengar pada 16 Mac 1989 dan telah diperintahkan bahawa tindakan itu ditetapkan untuk perbicaraan dalam tempoh 60 hari. Plaintif gagal berbuat demikian dan pada 17 Julai 1993, iaitu lebih kurang empat tahun kemudian, defendan telah memohon supaya tindakan ini dibuang atas alasan ketiadaan pendakwaan di bawah A 25 k 1(4) dan A 34 k 8(1) KMT itu dan di bawah bidang kuasa sedia ada mahkamah.

B Alasan yang diberikan oleh plaintif untuk menentang permohonan defendan adalah, antara lain, bahawa: (i) defendan telah gagal menunjukkan kelengahan itu sengaja dilakukan dan patut dihina dan telah mengakibatkan kemudaratan kepada mereka; dan (ii) defendan tidak boleh mengadu tentang kelengahan itu kerana mereka sendiri tidak meneruskan tuntutan balas mereka terhadap plaintif.

C **Diputuskan**, membuang tindakan plaintif kerana ketiadaan pendakwaan:

D (1) Aturan 25 k 1(4) KMT itu tidak terpakai atas fakta kes ini kerana aturan ini berkenaan dengan kegagalan plaintif dalam sesuatu tindakan untuk mengeluarkan suatu saman untuk arahan. Di dalam kes ini, plaintif telahpun mengeluarkan suatu saman untuk arahan dan oleh itu permohonan di bawah aturan itu tidak dibenarkan.

E (2) Kegagalan defendan untuk menyatakan dengan tegas bagaimana kelengahan itu telah menyebabkan kemudaratan kepada mereka dan untuk menunjukkan bahawa kelengahan plaintif sengaja dan menghina, tidak membawa padah kepada permohonan mereka. Kelengahan selama empat tahun itu sudah tentu berketerlaluan dan tidak boleh dimaafkan kerana ia amat memudaratkan defendan dengan adanya tindakan yang selalu mengganggu fikiran mereka selama suatu tempoh yang tidak tetap, tanpa mengetahui bila ia akan dibicarakan. Semakin lama kelengahan semakin besar kemungkinan bahawa kemudaratan yang serius akan berlaku pada perbicaraan dan inferens yang mesti dibuat daripada keterangan adalah bahawa keingkaran plaintif sengaja dilakukan dan patut dihina. Lebih-lebih lagi, polisi awam dan pentadbiran keadilan tidak akan membiarkan tindakan plaintif yang indolen itu berlaku.

F (3) Penyataan mengenai penyalahgunaan proses mahkamah di dalam permohonan plaintif, iaitu suatu alasan yang tidak diterima apabila membuang sesuatu tindakan kerana ketiadaan pendakwaan, tidak merampas bidang kuasa mahkamah untuk membuang tindakan plaintif di bawah A 34 k 2(2) KMT itu.

G (4) Mahkamah tidak boleh menolak suatu permohonan untuk membuang sesuatu tindakan kerana ketiadaan pendakwaan di bawah A 34 k 2(2) KMT itu semata-matanya atas alasan bahawa defendan juga bersalah kerana kelengahan dalam meneruskan tuntutan balasnya. Sebaliknya, mahkamah hanya boleh membuang

sesuatu tindakan di bawah A 34 k 2(2) KMT itu di mana suatu permohonan telah dibuat dan di dalam kes ini, plaintif tidak memohon untuk membuang tuntutan balas itu atas alasan ketiadaan pendakwaan. Walau bagaimanapun, ketidakmampuan mahkamah untuk membuang tuntutan balas defendan tidak menjejaskan budi bicaranya untuk membuang tindakan plaintif kerana ketiadaan pendakwaan.

Per curiam:

Permohonan defendan di bawah A 34 k 8(1) KMT itu dibuat dengan salah kerana A 34 k 8(1) berkenaan dengan suatu situasi di mana seseorang plaintif dalam suatu tindakan gagal memberi notis tentang perbicaraan dalam tempoh masa yang ditetapkan. Notis perbicaraan itu diperuntukkan di bawah A 34 k 7 KMT itu dan tidak kena-mengena dengan suatu perintah yang menetapkan suatu tindakan untuk dibicarakan.]

Notes

For cases on striking out for want of prosecution, see 2 *Mallal's Digest* (4th Ed) paras 2382-2383.

Cases referred to

- 1 *Toh Hock Thye & Ors v Toh Chwee Biow* [1982] 1 MLJ 152 (refd)
- 2 *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150 (folld)
- 3 *Zimmer Orthopaedic Ltd v Zimmer Manufacturing Co* [1968] 3 All ER 449; [1968] 1 WLR 1349 (distd)
- 4 *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229; [1968] 1 All ER 543; [1968] 2 WLR 366 (refd)

Paul Tang (Tan & Yap) for the plaintiffs.

Loretta Lau (Ibrahim & Co) for the defendants.

Cur Adv Vult

Abdul Kadir Sulaiman J: This is an application by the defendants pursuant to O 25 r 1(4) and O 34 r 8(1) of the Rules of the High Court 1980 (hereinafter referred to as 'the RHC') and under the inherent jurisdiction of the court. Under this last head, the court has an inherent jurisdiction to dismiss an action for want of prosecution where there is default in compliance with an order of the court or where the plaintiff is guilty of excessive delay in the prosecution of the action. See 1 *Supreme Court Practice 1979* ('the White Book 1979') at p 431. The application arose out of a writ of summons taken up by the plaintiffs in the Civil Division, High Court of Malaya at Kuala Lumpur and registered as Suit No S5-23-7 of 1988 for alleged breach of contract for the supply of batching concrete by the plaintiffs, as sub-contractor, to the defendants who were the main contractor. The plaintiffs claim against the defendants for special damages amounting to RM255,982.14, general damages, interest and such further and/or other relief as the court deems fit. It was alleged in the statement of claim that the

- A defendants terminated the contract vide a letter dated 7 April 1987. The writ was issued on 7 January 1988, ie some seven months after the alleged breach by the defendants. The defendants filed their defence and counterclaim on 21 June 1988. Surprisingly, according to the record, the plaintiffs filed their reply and defence to counterclaim on 12 May 1988, which was earlier than the filing of the defence and counterclaim by the
- B defendants. Be that as it may, on 10 March 1988, ie before the filing of the defence by the defendants, the defendants, by a summons-in-chambers, applied for the suit to be transferred to the High Court of Borneo at Kuching on the ground that the cause of action, if any, arose in Kuching, Sarawak. The said application of the defendants was heard on 8 June 1989,
- C ie after the filing of the defence by the defendants, and by a court order of the same date, the suit was ordered to be transferred to the High Court here. However, only in late January 1990, by a letter dated 23 January 1990, the learned senior assistant registrar, Civil Division, High Court, Kuala Lumpur transmitted the case docket to High Court, Kuching with a copy of the letter extended to the solicitors for both the parties. The docket reached the
- D Kuching High Court Registry on 1 February 1990.

- There was a confusion, in that notwithstanding the filing of their application for the suit to be transferred to the Kuching High Court made on 10 March 1988, the defendants by another summons-in-chambers dated 29 July 1988, this time after the filing of their defence on 21 June
- E 1988, made another identical application to the High Court at Kuala Lumpur for the transfer of the suit to Kuching. This second application of the defendants came up for disposal in the Kuala Lumpur High Court on 27 November 1989 but as both parties were absent, the matter was struck off. This fact is mentioned because in the affidavit-in-reply of the plaintiffs to the defendants' present application for the dismissal of the suit for want of prosecution, the plaintiffs gave it as one of the reasons for the delay in
- F prosecuting the suit.

- On 19 December 1988, ie before the order for the transfer of the case to Kuching made on 8 June 1989, the plaintiffs applied for a summons for directions under O 25 of the RHC to the Kuala Lumpur High Court and the matter came up for disposal on 16 March 1989. By a court order dated
- G 16 March 1989, it was ordered that the suit be set down for trial within 60 days, which under the circumstances would expire around 26 May 1989. It is to be noted that by the expiration date for the suit to be set down for trial, no order for the transfer of the suit to Kuching had yet been made. However, the plaintiffs have not set the suit down for trial as ordered. It was
- H this order of the court that the defendants, by this present application, put in as a ground for inviting the discretion of the court to have the suit dismissed for want of prosecution, for until the date of the application, ie 17 July 1993, for a period of over four years, the plaintiffs had not set the suit down for trial as required by O 34 r 2(2) of the RHC.

- I Before going further to determine the matter, I would like to dispose of part of the matter contained in the application of the defendants by the summons-in-chambers herein. For the delay caused by the plaintiffs in setting down the suit for trial, the defendants also pray that this suit be dismissed for want of prosecution in contravention of O 25 r 1(4) of the

RHC. This order concerns the failure on the part of a plaintiff to take out a summons for directions. As a summons for directions has been taken out in this case, the question of the court exercising its power of dismissal under O 25 r 1(4) of the RHC would not arise and in the circumstances the application under this head is disallowed.

The defendants, by their summons-in-chambers to have this action dismissed for want of prosecution, also prayed for the court to do so under O 34 r 8(1) of the RHC, the reason being that the plaintiffs had failed to give notice of the trial within the time prescribed. However, in the affidavit of Anthony GC Bong, counsel for the defendants, affirmed on 17 July 1993, in support of the application, after narrating the facts leading to the application, the deponent at paras 15 and 16 stated as follows:

15 To date the plaintiffs had not set the suit down for trial within 60 days as ordered pursuant to the court order dated 16 March 1989. The plaintiffs accordingly had failed to set the suit down for trial in pursuant to O 34 r 2 of the Rules of the High Court 1980.

16 That for the reasons mentioned, I verily believe that the plaintiffs' inaction amounts to an abuse of the process of the court and had delayed the fair trial of this action.

Thus, by the evidence in the affidavit, the complaint of the defendants is that to date the plaintiffs had not set down the suit for trial as ordered pursuant to the summons for directions. Order 34 r 2(2) of the RHC, *inter alia*, states that where the plaintiff does not within the period fixed, set the action down for trial, the defendant may apply to the court to dismiss the action for want of prosecution. The affidavit goes on to state in effect that by the plaintiffs' failure to set down the suit for trial as ordered, the plaintiffs had failed to comply with O 34 r 2 of the RHC, which in this case is O 34 r 2(2) as mentioned above. However, prayer (c) of their summons-in-chambers cited O 34 r 8(1) of the RHC as the basis for the application being the plaintiffs' failure to give notice of trial within the time prescribed. The notice of trial is the confine of O 34 r 7 of the RHC which has nothing to do with an order setting down an action for trial which is the confine of O 25 and O 34 r 2(2) of the RHC. *Mallal's Supreme Court Practice* (2nd Ed) at p 413 in relation to O 34 r 2(1) has this to say: 'An order for setting down an action for trial is a necessary item in a summons for directions which itself is a mandatory step to be taken. Notice of trial (r 7 of the Order) is therefore unnecessary.' When dealing with O 34 r 7, the learned author has this to say: 'An order for setting down is necessarily to be applied for in a summons for directions under O 25 ... Notice of trial is therefore unnecessary.' Therefore it is clear that for our purpose, what is really necessary is the compliance with the order made upon a summons for directions under O 25. Failure to do so in the case of an order for setting down the suit for trial would attract O 34 r 2(2) and not O 34 r 8(1) of the RHC.

Now, I will come back to the issue of delay on the part of the plaintiffs to set down the suit for trial as ordered by the court on 16 March 1989 on the application made by the defendants to have the suit dismissed for want of prosecution. The court on hearing such an application, may order that

- A the action or suit be dismissed or make such order as it thinks just: O 34 r 2(2) of the RHC. The law on this is clear. A plaintiff's action is liable to be dismissed for want of prosecution when the court is satisfied that: (a) the plaintiff's default has been intentional and contumelious; or (b) the plaintiff or his lawyer is guilty of such inordinate and inexcusable delay that the defendant has been prejudiced by it: *Toh Hock Thye & Ors v Toh Chwee Bioh*.¹
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In this case before me now, as stated earlier, the delay has been for a period of over four years since the order made in 1989. Prima facie, the delay can mean nothing but inordinate. So unless a credible excuse is made out by the plaintiffs, the delay is inexcusable. The suit has been hanging over the defendants' heads for that length of time. Had the move not been made by the defendants by this application, it is not known how much longer it would be. After all, it is the plaintiffs who made the allegation against the defendants in the suit but after doing so, they went into deep slumber. On the part of the court, the suit remains in its statistics. This, when added together with the suits of other similar plaintiffs, will naturally cause a backlog of cases which in the eyes of those concerned is not at all welcome. The image of the judiciary on the whole is at stake due to the presence of such indolent plaintiffs. So now in this case before me, have the plaintiffs by their evidence made out a credible excuse for their delay in not having the suit set down for trial as required by the order made on the summons for directions?

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The plaintiffs' explanation as to the delay caused is contained in the affidavit-in-reply of Paramjit Singh, the solicitor alleged to be having the conduct of the matter, affirmed on 25 November 1993. What appeared from the said affidavit is that the matter was in the hands of his assistant who had gone to London on the Commonwealth Student Programme for a period of six months and after her return she resigned from the firm about six months later without giving the deponent a status report on the matter and it was not until this present application of the defendants that he called up the file for review. Thus the blame to some extent is placed on his assistant. In the light of the authorities, in my judgment, this cannot be a credible excuse at all as otherwise, the plaintiffs will always escape by laying the blame on their solicitors, particularly in this case the blame is further shifted to the solicitor who has left the firm. The plaintiffs are responsible for the negligence of their lawyers. Plaintiffs' solicitors who do not 'get on' with their cases will be at risk of having the plaintiffs' action dismissed for want of prosecution and themselves rendered liable for negligence to the plaintiffs as their own former client. See p 432 of the White Book 1979.

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At para 3 of the said affidavit-in-reply, the plaintiffs aver that although the defendants obtained an order on 8 June 1989 to transfer the suit to Kuching, there was delay and confusion in the file being transferred out of the Kuala Lumpur High Court. This the plaintiffs say was beyond their control. Indirectly, the plaintiffs here are trying to lay the blame on the Kuala Lumpur High Court for the delay in transmitting the case dockets to the Kuching High Court thereby causing the plaintiffs to delay the setting down of the suit for trial as ordered. The order for the setting down was

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made on 16 March 1989. A period of 60 days was given to do so. During this period the suit was still with the Kuala Lumpur High Court Registry, for the order for its transfer was not yet made. But the plaintiffs did not comply with the time-frame. No explanation was given for this. If the reason being that there was then a pending application for transfer and, therefore, the plaintiffs could not have set it down for trial in Kuala Lumpur, how then were their affidavit verifying the list of documents affirmed on 8 August 1989 and list of documents dated 6 July 1989 filed at the Kuala Lumpur High Court Registry when by that time the order of transfer was already made, ie on 8 June 1989. So to put the blame on the delay and confusion in getting the file transferred to Kuching is a lame excuse for the delay in setting down the suit for trial.

Another explanation given by the plaintiffs for the delay is that there was confusion created in being informed by the court by its letter dated 10 January 1990 that the suit has been struck off due to the absence of parties. If it will be remembered, the matter that was struck off was in relation to the defendants' second application to have the suit transferred to Kuching whilst a similar application had already been filed in court. Whatever it may be, on the receipt of the information, what step did the plaintiffs take as regards the striking off? No effort was made to file an application to have the order set aside if the plaintiffs were still interested in their claim. Instead, on 30 January 1990, the solicitors wrote to the court to say that they were not aware of the hearing and requested the court to have the suit transferred to Kuching immediately. However, this letter of the plaintiffs is not in the record. If received, it might be lying somewhere, for the docket was sent to Kuching together with a letter dated 23 January 1990 and it was not until 1 February 1990 that the case docket was received in Kuching. Not having set down the suit for trial and not having taken any step to have the striking off order set aside, the plaintiffs, on 24 August 1991 made a file search and discovered that the file had been transferred to Kuching. Now, having known of the fact, why was the setting down again not done? If this was done, albeit a little late, the application of the defendants to have the suit dismissed would not have been filed. So, here I hold that a credible excuse is not made out by the plaintiffs for the inordinate delay.

The learned counsel for the plaintiffs in his submission, while conceding that the court may exercise its power to have the suit dismissed if the default has been intentional and contumelious, or that there has been inordinate and inexcusable delay on the part of the plaintiffs or their lawyers and such delay would give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiffs or between each other or between them and a third party, went on to attack the application of the defendants by saying that the grounds relied upon by the defendants in their application were not in accordance with established principles for such application. This is so, says the learned counsel, based on para 16 of the affidavit in support of the defendants. Paragraph 16 states:

A That for the reasons mentioned, I verily believe that the plaintiffs' inaction amounts to an abuse of the process of the court and has delayed the fair trial of this action.

The learned counsel so submits that the grounds of the defendants are not based on the principles or grounds that would give the court the discretion to dismiss. He further submits that the defendants have failed to show the court why and how such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiffs or between each other or between them and a third party. Further, the defendants have failed to show that their application is based on the plaintiffs' intentional and contumelious default. I see no merit in the submission so made. The application in the summons-in-chambers of the defendants prays for an order that the action be dismissed for want of prosecution as the plaintiffs had failed to set down the action for trial within the time allowed. The application also states that the failure on the part of the plaintiffs in taking the appropriate action is an abuse of the process of the court and is delaying the fair trial of this action. Paragraph 15 of the affidavit in support states:

To date the plaintiffs had not set the suit down for trial within 60 days as ordered pursuant to the court order dated 16 March 1989. The plaintiffs accordingly had failed to set the suit down for trial in pursuant to O 34 r 2 of the Rules of the High Court 1980.

On this basis, notwithstanding the mention of the abuse of the process of the court in an application for dismissal for want of prosecution, it will not take away the jurisdiction of the court under O 34 r 2(2) of the RHC to determine, in the exercise of its discretion, whether or not to dismiss the suit of the plaintiffs. No doubt the defendants by their affidavit have not shown to the court why or how such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiffs or between each other or between them and a third party. In *Vasudevan v T Damodaran & Anor*,² Abdoolcader J (as he then was), delivering the judgment of the then Federal Court said at p 151:

We would specifically refer to the propositions enunciated by Salmon LJ in *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 (at p 268) to the effect, inter alia, in relation to the inordinate delay being inexcusable that as a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable, and again with regard to the question of serious prejudice to defendants by the delay, that this may be prejudice at the trial of the issue between themselves and the plaintiff or between each other or between themselves and third parties, and that as a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

Further down, his Lordship went on to say:

We would draw particular attention to the judgment of Lord Denning MR, stating (at p 389) that prejudice to a defendant by a plaintiff's delay is not limited

to the death or disappearance of witnesses or their fading memories or in the loss or destruction of records since there is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial.

For my part, I would add that just as the defendant would be much prejudiced in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial, public policy and the administration of justice would also not condone the action of a plaintiff who is indolent thereby stalling the speedy disposal of the action in court. If everyone involved complies with the rules laid down we would not be talking of backlog of cases in court. When a plaintiff files a suit against a defendant, his action adds to the volume of cases to be disposed of by the court. If by his inaction to follow the rules or orders made, he allows himself [to fall] in deep slumber, and other plaintiffs adopt the same stand as well, then the backlog of cases in court will not be reduced if not increased. A time has come when the court must be firm on this issue so as to be away from the problem faced. It cannot be said that by being firm, the court is doing a hurried justice for there is no hurry in the matter. It was the plaintiff who by the rules is delaying the administration of justice. Justice delayed is justice denied.

Hence, on the authority, I would say that such failure on the part of the defendants to affirmatively state why and how there would be such prejudice, is not fatal to their application. No one would argue that a four-year delay in setting down the suit for trial is not inordinate. Such being the case, it is for the plaintiffs, when faced with such an application by the defendants, to give a credible excuse as otherwise, the natural inference would be that it is inexcusable. On the serious prejudice to the defendants, as a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial. There is much prejudice to the defendants in having the suit against them hanging over their heads indefinitely, not knowing when it is going to be brought to trial. After all, it is the plaintiffs who chose to take an action against them. If the plaintiffs are indolent after that to pursue the matter, enjoying a deep slumber, the defendants on the other hand cannot sleep well so long as the suit is hanging over their heads. Had it not been for the defendants in this case waking up the plaintiffs from their slumber, the suit would remain in the court's record until such time as the court exercises its power under O 34 r 7A(2) of the RHC.

On the issue that the defendants had failed to show that their application is based on the plaintiffs' intentional and contumelious default, I am satisfied that from the evidence before me, the necessary inference is that the plaintiffs' default has been intentional and contumelious. The excuses given are weak. There were ample opportunities for the plaintiffs to comply with the court order made on the summons for directions rather than complaining of the so-called delay and confusion caused by the court. At any rate, why was no action taken albeit late, after the discovery on 24 August 1991 that the matter was already with the Kuching High Court? The fault, if any, committed by the legal assistant of the plaintiffs' solicitors' firm is no excuse at all for the delay. The plaintiffs in resisting the application of the

- A defendants, at para 13, aver that their claim discloses a reasonable cause of action and is not an abuse of the process of the court. If that be so, why the delay in prosecuting the action? Just because the plaintiffs feel that they have a reasonable cause of action against the defendants, can they with impunity be allowed to suffer the defendants with the action hanging over their heads and asking the court to wait until such time they are ready to wake up from their slumber? So for the reasons stated, I am satisfied that on this ground alone the defendants would succeed in their application to have the plaintiffs' action dismissed for want of prosecution for their failure to set down the suit for trial as ordered by the court. If I am wrong in holding that the plaintiffs' default has been intentional and contumelious, C the suit also ought to be dismissed on the ground of inordinate and inexcusable delay on the part of the plaintiffs that the defendants have been prejudiced by it.

- However, in the submissions by the learned counsel for the plaintiffs, the plaintiffs contend that the defendants cannot complain of the delay caused by the plaintiffs as the defendants have a counterclaim against them. Under D the head of special damages, the plaintiffs claim for a sum of RM255,982.14 whereas the defendants by way of counterclaim are claiming for RM1,529,700. So, the plaintiffs say why complain of delay against them when the defendants themselves are not interested in their claim which is for a bigger amount. Admittedly, the defendants did nothing to pursue the E matter of the counterclaim and in the course of the submission, the learned counsel for the defendants indicated that the defendants wished to proceed with the counterclaim against the plaintiffs. The plaintiffs, on the other hand, have also not chosen to apply to the court to have the counterclaim of the defendants dismissed for want of prosecution. As an authority, the learned counsel cited *Zimmer Orthopaedic Ltd v Zimmer Manufacturing Co*³ F in support. However, in the *Zimmer* case,³ the facts are slightly different in that both the plaintiffs and the defendants there applied to the court to have the claim and the counterclaim dismissed for want of prosecution. The Court of Appeal, varying the order of the court below, ordered the dismissal of both the claim and the counterclaim as both parties were to blame for the G delay. The learned counsel for the plaintiffs submitted that what is important is that the defendants having filed a counterclaim and being in a position to prosecute the action, cannot complain of the delay. The short answer to that is that *Zimmer's* case³ on the facts, can be easily distinguished. On an application made by a defendant to have the claim of the plaintiff dismissed for want of prosecution under O 34 r 2(2) of the RHC, the court cannot H refuse the application of the defendant solely on the ground that the defendant has a counterclaim and it has delayed in pursuing the counterclaim whilst the plaintiff has not made an application to have the counterclaim dismissed. Order 34 r 2(2) of the RHC gives the power to the court to dismiss the action of the plaintiff for want of prosecution on the application I made by the defendant where the plaintiff does not within the time fixed, set the action down for trial. For the purpose of O 34 r 2(2), a defendant is also a plaintiff in relation to its counterclaim against the plaintiff. So, unless there is an application by a defendant in regard to the plaintiff's

claim or an application by the plaintiff in regard to the defendant's counterclaim, the court cannot exercise its power under O 34 r 2(2) of the RHC to dismiss the action of the plaintiff or the defendant as the case may be, for want of prosecution.

In this case before me now, there is no application by the plaintiffs to have the counterclaim of the defendants dismissed for want of prosecution. So the court acting under O 34 r 2(2) cannot dismiss the counterclaim of the defendants. Just because the court cannot do so, does not mean that on the application of the defendants the court cannot act under O 34 r 2(2) to dismiss the action of the plaintiffs provided sufficient grounds are available, simply because the defendants have delayed in prosecuting their counterclaim. So, on that ground I see no merit in the submission of the learned counsel for the plaintiffs.

In *Allen v Sir Alfred McAlpine & Sons Ltd*,⁴ quoted in *Vasudevan's case*,² it was held that other than in a case of contumelious conduct on the plaintiff's part, the power of the court to dismiss an action for want of prosecution should not be exercised where the delay had not extended beyond the end of the limitation period for the cause of action. This is so, because for so long as the plaintiff is within the limitation period, after the dismissal by the court, there is nothing to stop the plaintiff from filing a fresh suit against the defendant. In this case, the cause of action based on the allegation in the statement of claim accrued in April 1987. The period of limitation in this case is six years. By the time the summons-in-chambers of the defendants was filed on 19 July 1993, the six years period had lapsed and by then the plaintiffs had not set down the action for trial as ordered. Thus, the exception mentioned in *Allen's case*,⁴ would not apply. Now, on the application of the defendants, I am satisfied that, if the plaintiffs are not also guilty of intentional and contumelious conduct, they are no doubt guilty of inordinate and inexcusable delay causing much prejudice to the defendants in having the action hanging over their heads indefinitely, not knowing when it is going to be brought to trial. While this proceeding was going on, the plaintiffs on 8 December 1993 filed in a notification for setting down the action for trial. This to my mind is too late to defeat the application of the defendants. In the circumstances, in exercise of my discretion, I allow the application of the defendants and accordingly dismiss the action of the plaintiffs for want of prosecution. I also order that the costs of and occasioned by this application of the defendants be taxed unless agreed and paid by the plaintiffs to the defendants.

Application allowed.

Reported by Joseph Lim Tim Lee